SUPREME COURT, U. S.

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JOHN F. DAVIS

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. [redacted] 377

DUNBAR-STANLEY STUDIOS, INC.,
a Corporation,
Appellant,

vs.

CITY OF MOBILE,
Appellee.

MOTION TO DISMISS.

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MOTION TO DISMISS.

Appellee, City of Mobile, a Municipal Corporation, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the attempted appeal from the order of the Supreme Court of Alabama entering a judgment in affirmance of the decree of the Mobile Circuit Court be dismissed, on the grounds that the United States Supreme Court will decline to review State Court judgments which rest on independent and adequate State

grounds, despite the possible co-presence of federal grounds, or in the alternative that the appeal in this case be dismissed on the ground that there is no basis for federal jurisdiction, and on the ground that the appeal in this case be dismissed for that the rule of this Court, Revised Rule No. 15 (d) has not been complied with sufficiently to support the assertion that the ruling of the State Court was of a nature to bring the case within the statutory provision believed to confer jurisdiction on this Court.

OPINION.

This is a direct appeal from an order entered on June 13, 1968, by the Supreme Court of Alabama affirming the decree of the Mobile Circuit Court which had sustained the demurrer of the Appellee and dismissed the Bill of the Appellant herein, Dunbar-Stanley Studios, Inc., which sought to have considered in a declaratory judgment proceeding the citation of J. C. Penney Company to pay a photographer's privilege license imposed by an ordinance. The opinion of the Supreme Court of Alabama is appended to Appellant's jurisdictional statement and is now reported in 211 So. 2d 803.

The Per Curiam opinion of the Alabama Supreme Court concluded that the Bill of Complaint of the Appellant failed to show on its face a "justiciable controversy" and therefore failed to confer jurisdiction on the trial court to consider the action, due to the failure of the Appellant to join an indispensable party in the action. The Alabama Court cited Southern Railway Company v. Curry, 239 Ala. 263, 194 So. 523, as the basis for its decision that a declaratory judgment to determine the validity of a privilege license imposed on a third party must have, as an indispensable party, the third party taxpayer against whom the license has actually been imposed.

STATEMENT OF THE CASE.

This was a suit filed in the Circuit Court of Mobile County, Alabama, for declaratory judgment, by Appellant, not a taxpayer or licensee of the City of Mobile, against the City of Mobile, to determine the validity of a recently amended City "Photographers" license ordinance. The City's demurrer to the bill was sustained. After amendment to the Bill, the City filed its amended demurrer which was sustained, and the bill was dismissed, after the Appellant declined further to amend.

On appeal by the Appellant to the Supreme Court of Alabama, the decree of the Circuit Court was affirmed, and the Appellant seeks to have this judgment reviewed on this appeal.

STATEMENTS OF FACTS.

THERE ARE NO FACTS IN THIS CASE.

The effect of the demurrer of the Appellee is to test the sufficiency of the allegations of the Appellant's complaint in fulfilling the State substantive and procedural requirements called for by statute and case law as necessary to enable the Appellant to proceed with a declaratory judgment action. The allegations in the Bill of Complaint, and amendment are taken as true. (Unless the facts in the bill are in conflict, in which case the court may take its choice, or may sustain a demurrer for vagueness; furthermore, facts in exhibits rule over facts alleged in the bill if the two sets of facts are in conflict.) The Appellant in its jurisdictional statement has alleged many "facts" which Appellant apparently did not see fit to put in the Bill of Complaint. These additional extraneous "facts" were not considered by the trial court or the Alabama Supreme Court when determining the sufficiency of the bill on demurrer.

As read by the Alabama Court, the Appellant's complaint shows that the Appellee, City of Mobile, issued a citation to J. C. Penney Company, a non-resident corporation operating a retail store in the City of Mobile for the sale of merchandise. The citation called upon Penney Company to pay a Photographer's privilege license imposed by an ordinance. Penney Company had prior to this citation been paying to the City an amount called for from one qualifying as a "studio photographer". The Bill does not allege that Penney qualified as a "studio photographer" although paying for a license as such. Upon amendment of the licensing ordinance of the City covering "Photographers" the citation referred to was served upon Penney, seeking compliance with that portion of the ordinance as amended under which the activities of the Penney Company on its premises were deemed by the City to qualify, i. e., furnishing "photographic services".

J. C. Penney Company was neither made a party to this suit nor does it appear that said company has either agreed or refused to pay the license. There is no contention in the Appellant's Bill of Complaint that Appellant has been cited or requested to pay the license. Despite this alleged state of facts, Appellant, in its complaint challenges the validity of the ordinance and its constitutionality as applied to Appellant. The further allegations of the bill concerning the operations of Penney Company in furnishing "photographic service", and the Appellant in furnishing a camera, operator and film processing, are summarized by the Alabama Supreme Court as follows:

> "We think the complaint adequately shows that Penney Company and appellant entered into a contractual agreement whereby appellant was to perform photographic service for the public in the several Penney Company stores in Alabama (including the one in Mobile), with a division of net profits after deduction of expenses. Appellant is a non-

resident corporation with its main office in Charlotte, North Carolina.

"Appellant sends a photographer to Alabama to perform skilled service in taking children's photographs. The film, after exposure before its subjects in the Penney Company store, is sent to the North Carolina studio, there to be developed and converted into a finished photograph, which is sent back to Alabama for delivery by Penney Company employees to the customer. No photographer engaged in the service is a resident of Alabama.

"It further appears that the Penney Company store in Mobile (as do other Penney Company stores in Alabama) causes certain advertising to be done. This advertising tends to recruit customers for the proposed photographic service. Penney Company takes the orders, which are transmitted to appellant in Charlotte, North Carolina, for approval and acceptance. When the orders are accepted, the finished products are sent to the Penney Company stores for delivery by Penney Company employees to the customer and collection of pecuniary charges for the service and product. Penney Company receives a percentage of the money, so collected, and accounts to appellant for the balance. Penney Company makes accounting reports to appellant and to its home office.

"We might add that Penney Company prepares cards notifying its customers of the proposed visit of the photographer. Penney Company assumes marked responsibility in trying to drum up photographic business from its prospective customers.

"Appellant maintains no office, developing laboratory, or permanent agent in Alabama. The service, exposing the film before the subject child, is performed in Alabama (Mobile) with appellant's equipment that is temporarily located in Alabama. The laboratory equipment for developing the film is all

located in North Carolina. With the exception of the laboratory work, preparing announcement cards, exposing the films, all the work incident to the photographic service is performed by Penney Company employees. The photographer takes no orders for the pictures."

In short, Penney Company provides the premises, with all that entails, and the entire facilities, except as noted above by the Court, in providing the "photographic service" for which the City, appellee, sought to require a license fee, from Penney Company.

JURISDICTION.

Jurisdiction for this appeal is sought to be found under 28 U. S. C., Sec. 1257 (2).

Appendix, Exhibit A of Appellant's jurisdictional statement sets out the opinion of the Alabama Supreme Court. Appellee can find no statement in the opinion which indicates a consideration of the validity of a state (municipal) statute on the ground that it is repugnant to the constitution, treaties or laws of the United States. A *fortiori* Appellee can find nothing in the decision of the Supreme Court of Alabama which appears to be a decision in favor of the validity of the state (municipal) statute contended to be repugnant to the constitution, treaties or laws of the United States.

Therefore, there is no jurisdiction for this appeal to be found under 28 U. S. C., Sec. 1257 (2).

Jurisdiction for this appeal is not contended for, nor is jurisdiction found, in 28 U. S. C., Sec. 1257 (1) concerning the question of the validity of a treaty or statute of the United States as no such treaty or statute is alleged to be involved.

Therefore, there is no jurisdiction for **appeal** to the United States Supreme Court in this case by appellant on statutory authority.

There is no jurisdiction by writ of certiorari because the judgment rests on an independent and adequate non-federal ground.

Johnson v. New Jersey, 384 U. S. 719, 16 L. Ed. 2d 882, 86 S. Ct. 1772 (1966);

Newman v. Gates, 204 U. S. 89, 51 L. Ed. 385, 27 S. Ct. 220 (1906);

John v. Paullin, 231 U. S. 585, 58 L. Ed. 383, 34 S. Ct. 179.

The independent and adequate state ground for the decision of the Alabama Supreme Court is shown in the opinion of that Court, Appellant's jurisdictional statement, Appendix, Exhibit A. Certainly the opinion of the Alabama Court shows the Court to be following its own precedent, Southern Railway Company v. Curry, 239 Ala. 263, 194 So. 523, in a closely analogous case. Both in the instant case and in Southern v. Curry, *supra;* the aim sought is that "The trial court with all the parties before it, could have decreed complete justice, binding on all the parties, this obviating piece meal or fragmentary justice", to quote the court in the instant case.

In the appendix to this motion; Exhibit A, is a brief of supporting authorities showing the statutory and case law of Alabama requiring that parties with an interest in the determination sought to be resolved by a declaratory judgment action be made parties as a substantive requirement of jurisdiction of the trial court in the suit. Primarily, the brief is included to show the substantial and adequate non-federal basis for the decision of the Alabama Court. Parenthetically, Judge Simmons has ex parte mentioned that the appended brief was followed in writing the opinion of the Alabama Court.

The Rule of this Court concerning Jurisdictional Statements, Rule 15 (d), requires the jurisdictional statement by Appellant to specify "the way in which they (the federal questions) were passed upon by the Court (State Court) with such pertinent quotations of specific portions of the record, or summary thereof, with specific references to the places in the record where the matter appears (. . .) as will support the assertion that the rulings of the Court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this Court" (Parenthesis added).

Appellee can find no compliance with these requirements in the jurisdictional statement of the Appellant.

Without specific references to the place in the record where the matter appears, on page 12 of Appellant's Jurisdictional statement is a "summary" of the holding of the Alabama Court. Appellant "summarizes" that, as Appellee "had billed J. C. Penney for this license, as shown on the Exhibit to the bill, therefore, taxpayer could not raise the federal questions concerning the constitutionality of this license regardless of the allegations of the Amended Bill". Appellee cannot find such a "holding" in the Alabama Court opinion. Rather, it seems possible that if Appellant had joined J. C. Penney Company in the action, Appellant would have had the opportunity of attempting to prove its allegations no matter how contradictory, conflicting or fictitious the allegations may be. Instead, the Appellant refused to amend further and suffered a dismissal of the cause in order that it might appeal.

Similarly, without specific references, Page 14 of the Appellant's Jurisdictional Statement alludes to a part of the Alabama Court's **reasoning** as a "holding" of that Court. If nothing else, Page 14 shows Appellant is painfully aware that the Alabama Court sustained the demurrer on the ground that an indispensable party was not made a party to the action, as shown by Ap-

pellant's Bill of Complaint, thereby depriving the trial court of jurisdiction in the matter.

Further, without references to the record or opinion, Appellant's Jurisdictional Statement refers on Pages 7, 13 and 16 to a state court holding of "no standing" and on Page 17 to a holding by the state court that "taxpayer cannot raise questions of the constitutionality of this ordinance". Appellee has been unable to find any such holdings in the Alabama Court opinion. Rather, the only holding seems to be that to have "standing", and be able to "raise questions" the Appellant must bring in the indispensable party alleged by Appellant in Bill and exhibit to have been actually cited for an amount due under the ordinance in question. Certainly this is an independent and adequate as well as an equitable basis for the State Court judgment.

There is no jurisdiction or good cause for granting a writ of certiorari in this Court.

AUTHORITIES.

A copy of the Brief submitted by Appellee on appeal of this cause to the Alabama Supreme Court is attached hereto as Exhibit A to show specific authority applicable to this case.

A late Review of Actions under the Alabama Declaratory Judgment statutes can be found in **The Alabama Lawyer**, Vol. 29, No. 3, July, 1968, page 344. See especially pages 346 and 349—Justiciable Controversy and Parties.

Respectfully submitted,

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